No. 89-524

(5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.

and

HIGHTWORTH SHIPPING LTD.,

Petitioners,

v.

JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES,

and

PIONEER NAVIGATION, LTD.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONERS SAMMILINE COMPANY, LTD. AND HIGHTWORTH SHIPPING LTD. TO THE OPPOSITION SUBMITTED BY PIONEER NAVIGATION, LTD.

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PREFACE

Petitioners, Sammiline Company, Ltd. and Hightworth Shipping Limited,[1] previously filed a reply to the opposition submitted by respondents John and Beverly Woods on November 3, 1989. At the time petitioners filed that reply, respondent Pioneer Navigation, Ltd. had not filed and did not intend to file an opposition to this writ application. However, by letter of November 7, 1989, the Clerk on behalf of the Court requested that Pioneer file a response. This reply addresses the brief filed by Pioneer in answer to the Clerk's letter.

Pioneer Navigation, Ltd. does not question that the first issue in this case—regarding the liability of the vessel interests to respondents John and Beverly Woods under *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981) and Section 5(b) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 905(b)) —presents a conflict among the circuits that this Court should resolve.

Pioneer's only real challenge is to petitioners' second question, that is, whether Clause 8 of the New York Produce Exchange Charter Party form shifts to time charterer Pioneer all responsibility for negligence or fault giving rise to injury during cargo operations. Pioneer argues that this issue is not involved in this case.

Pioneer, without stating any reasons, also contends that petitioners' third question, concerning how the negligence of an injured longshoreman's stevedore employer should be allocated between a vessel owner and time charterer, is unimportant.

Because Pioneer's only real challenge is to petitioners' second question, this reply is limited to that question.

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[1] Petitioners' Rule 28.1 statement is set forth at page ii of their petition. Petitioners, Sammiline and Hightworth, have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

THE CONFLICT AMONG THE CIRCUITS REGARDING INTERPRETATION OF CLAUSE 8 PRESENTS AN IMPORTANT QUESTION OF MARITIME LAW DIRECTLY IMPACTING LIABILITY BETWEEN THE SHIPOWNER AND TIME CHARTERER IN THIS CASE

Pioneer does not seriously contest that a conflict exists between the leading Fifth Circuit case, *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), *cert. denied sub nom, Southern Stevedoring & Contracting Co. v. D/S Ove Skou*, 400 U.S. 902 (1970), and the decisions of other circuits regarding whether Clause 8 of the New York Produce Exchange time charter form shifts liability for negligence and resulting damages related to cargo operations from the vessel owner to the time charterer. Nor does Pioneer deny that the Fifth Circuit jurisprudence interpreting this clause differs depending upon whether the damage sustained is cargo damage or personal injury damage. *See generally* Petitioners' petition, 16-19.

Rather, without making any reference to any specific testimony or evidence, Pioneer contends that petitioners Sammiline and Hightworth, as the operator and owner of the M/V SAMMI HERALD, maintained full control over cargo loading and discharge operations. Pioneer argues that the conflict between *Ove Skou* and the decisions of other circuits need not be addressed in this case, because the courts below did not address this question. Pioneer reasons that the Fifth Circuit's holding that the time charterer (Pioneer) and the Shipowner (Sammiline and Hightworth) are each responsible for their own respective negligence demonstrates that *Ove Skou* was not applied to this case. Pioneer submits that had the Fifth Circuit applied *Ove Skou* to this case, it would have been totally exonerated from all responsibility for the injuries sustained by Mr. and Mrs. Woods.

Pioneer's argument evidences a misunderstanding of both *Ove Skou* and the Fifth Circuit's ruling in this case.

The fact that the courts below held the shipowner and the time charterer responsible in tort for their own respective negligence does not demonstrate, as Pioneer claims, that *Ove Skou* was not applied to this case. *Ove Skou* addresses two questions, both of which were addressed by the Fifth Circuit. First, *Ove Skou* questions whether Clause 8 *contractually* shifts responsibility to the time charterer for all vessel-related negligence occurring during cargo operations, no matter by whom committed. *Ove Skou*, at odds with the decisions of other circuits, holds that Clause 8 does not contractually shift this responsibility to the time charterer. *See* Petitioners' Petition, 16-19; Petitioners' Appendix, 26a-31a (873 F.2d at 856-58). Second, *Ove Skou* holds that while Clause 8 does not *contractually* shift responsibility for the operational fault occurring during cargo operations, the time charterer is responsible in tort, *independently of Clause 8*, for its own negligence related to cargo operations giving rise to a personal injury. *Id.*

Thus, the Fifth Circuit's finding that Pioneer would be held responsible for its own negligence as a matter of tort law, *i.e.*, the court's finding on the second *Ove Skou* question, does not mean that the Fifth Circuit did not also address the first *Ove Skou* question, *i.e.*, whether under Clause 8, Pioneer is *contractually* responsible for *all* vessel fault and negligence, no matter whether committed by the shipowner or the time charterer.

This conflict among the circuits regarding the interpretation of Clause 8 plainly is an issue that the Fifth Circuit expressly addressed and decided adversely to petitioners. Petitioners, as the vessel's shipowner, asserted that as between themselves and Pioneer, Clause 8 contractually shifted all responsibility for all negligence and fault during cargo operations to time charterer Pioneer. Even though under the law of the other circuits, petitioners would have prevailed, the Fifth Circuit expressly held that it was bound by *Ove Skou* to hold that Clause 8

did not contractually shift all such responsibility to time charterer Pioneer. Petitioners' Appendix, 28a-30a and n.18 (873 F.2d at 856-57 and n.18). Only after addressing this first question did the Fifth Circuit continue to discuss whether Pioneer itself was guilty of any negligence giving rise to liability in tort. Petitioners' Appendix, 29a-31a (873 F.2d at 857-58).

Thus, the first *Ove Skou* question, *i.e.*, whether Clause 8 shifts all responsibility to the time charterer for negligence related to cargo operations, plainly is an issue of great importance to the maritime law generally and to the law as applied to this case. This case directly presents this issue upon which the circuits are in conflict. This Court should grant a writ of certiorari to consider this important issue.

CONCLUSION

Petitioners' second issue, together with petitioners' remaining issues, present important questions of maritime law that should be addressed by this Court. Respondent Pioneer, like respondents John and Beverly Woods, has presented no valid reason for refusing to grant a writ. Petitioners respectfully submit that the Court should grant a writ of certiorari to consider these important questions.

Respectfully submitted,

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